

4600010728  
2011-0300

THE STATE OF TEXAS   §  
                                  §  
COUNTY OF HARRIS   §

## 1. PARTIES

### A. Address

**THIS AGREEMENT FOR ON-LINE LIBRARY BIBLIOGRAPHIC SUBSCRIPTION SERVICES** ("Agreement") is made on the Countersignature Date between the **CITY OF HOUSTON, TEXAS** ("City"), a home-rule city of the State of Texas, and ("Contractor"), **OCLC ONLINE COMPUTER LIBRARY CENTER, INC.**, a Ohio non-profit corporation doing business in Texas.

The initial addresses of the parties, which one party may change by giving written notice to the other party, are as follows:

#### City

City Purchasing Agent  
City of Houston  
P.O. Box 1562  
Houston, Texas 77251

#### Contractor

OCLC Online Computer Library Center, Inc.  
6565 Kilgour Place  
Dublin, Ohio 43017  
Attn: Tim Whisenant  
whisenat@oclc.org

The Parties agree as follows:

B. Table of Contents

This Agreement consists of the following sections:

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## **EXHIBITS**

- A. Scope of Service
- B. Equal Employment Opportunity
- C. Drug Policy Compliance Agreement
- D. Drug Policy Compliance Declaration
- E. Certification of no safety impact positions
- F. OCLC Services Agreement
- G. Form POP 2 – Certification of Agreement to Comply  
With Pay or Play Program

### C. Parts Incorporated

The above described exhibits are incorporated into this Agreement.

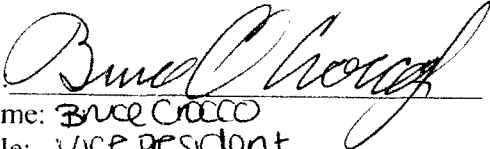
### D. Controlling Parts

If a conflict among the sections and exhibits arises, the sections control over the exhibits.

E. Signatures

The Parties have executed this Agreement in multiple copies, each of which is an original.

**OCLC ONLINE COMPUTER LIBRARY  
CENTER, INC.**

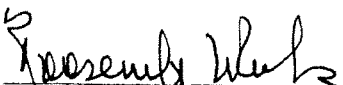
By:   
Name: Bruce Crocco  
Title: Vice President



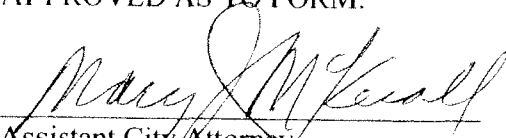
ATTEST/SEAL (if a corporation)  
WITNESS (if not a corporation)

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

APPROVED:

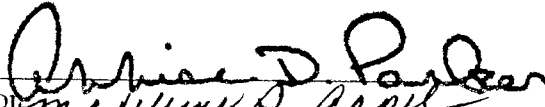
  
Director, Houston Public Library

APPROVED AS TO FORM:

  
Assistant City Attorney  
L.D. No. 0371100001001

**CITY OF HOUSTON, TEXAS**


Signed by:

By:   
Mayor Martina D. Apple

ATTEST/SEAL:

  
City Secretary

COUNTERSIGNED BY:

  
City Controller CLB. Brown

DATE COUNTERSIGNED:

5/4/11

## **II. DEFINITIONS**

As used in this Agreement, the following terms have the meanings set out below:

"Agreement" means this contract between the Parties, including all exhibits and any written amendments authorized by City Council and Contractor.

"City" is defined in the preamble of this Agreement and includes its successors and assigns.

"Contractor" is defined in the preamble of this Agreement and includes its successors and assigns.

"Countersignature Date" means the date shown as the date countersigned on the signature page of this Agreement.

"Director" means the City Purchasing Agent and the Director of the Houston Public Library, or their designee.

"Documents" mean notes, manuals, notebooks, plans, computations, databases, tabulations, exhibits, reports, underlying data, charts, analyses, maps, letters, models, forms photographs, the original tracings of all drawings and plans, and other work products (and any modifications or improvements to them) that Contractor prepares or provides under this Agreement.

"Houston Public Library" or "HPL" shall mean the City's Central Library and system of branch libraries that are the end-users of the services set out in this contract.

"Include" and "including", and words of similar import, shall be deemed to be followed by the words "without limitation".

"Installation Site(s)" means the Houston Public Library and its branch offices located within Houston.

"Notice to Proceed" means a written communication from the Director to Contractor instructing Contractor to begin performance.

"OCLC Bibliographic Record" shall mean a bibliographic record obtained directly from the WorldCat database by using Contractor's product or service.

"Parties" mean all the entities set out in the Preamble who are bound by this Agreement.

"WorldCat" means the global network of library content and services that uses the Web to let an institution such as the Houston Public Library be more connected, more open and more productive.

### **III. DUTIES OF CONTRACTOR**

#### **A. Scope of Services**

##### **Services in General**

In consideration of the payments specified in this Agreement, Contractor shall provide all labor, material, and supervision necessary to perform the services described in Exhibit "A".

#### **B. Coordinate Performance**

Contractor shall coordinate its performance with the Director and other persons that the Director designates. Contractor shall promptly inform the Director and other person(s) of all significant events relating to the performance of this Agreement.

#### **C. Payment of Subcontractors**

Contractor shall make timely payments to all persons and entities supplying labor, materials, or equipment for the performance of this Agreement. CONTRACTOR SHALL DEFEND AND INDEMNIFY THE CITY FROM ANY CLAIMS OR LIABILITY ARISING OUT OF CONTRACTOR'S FAILURE TO MAKE THESE PAYMENTS. Contractor shall submit disputes

relating to payment of MWBE subcontractors to arbitration in the same manner as any other disputes under the MWBE subcontract.

**D.     RELEASE**

**CONTRACTOR AGREES TO AND SHALL RELEASE THE CITY, ITS AGENTS, EMPLOYEES, OFFICERS, AND LEGAL REPRESENTATIVES (COLLECTIVELY THE "CITY") FROM ALL LIABILITY FOR INJURY, DEATH, DAMAGE, OR LOSS TO PERSONS OR PROPERTY SUSTAINED IN CONNECTION WITH OR INCIDENTAL TO PERFORMANCE UNDER THIS AGREEMENT.**

**E.     INDEMNIFICATION**

**CONTRACTOR AGREES TO AND SHALL DEFEND, INDEMNIFY, AND HOLD THE CITY, ITS AGENTS, EMPLOYEES, OFFICERS, AND LEGAL REPRESENTATIVES (COLLECTIVELY THE "CITY") HARMLESS FOR ALL CLAIMS, CAUSES OF ACTION, LIABILITIES, FINES, AND EXPENSES (INCLUDING, WITHOUT LIMITATION, ATTORNEYS' FEES, COURT COSTS, AND ALL OTHER DEFENSE COSTS AND INTEREST) FOR INJURY, DEATH, DAMAGE, OR LOSS TO PERSONS OR PROPERTY SUSTAINED IN CONNECTION WITH OR INCIDENTAL TO PERFORMANCE UNDER THIS AGREEMENT INCLUDING, WITHOUT LIMITATION, THOSE CAUSED BY:**

- (1)     CONTRACTOR'S AND/OR ITS AGENTS', EMPLOYEES', OFFICERS', DIRECTORS',     CONTRACTORS',     OR     SUBCONTRACTORS' (COLLECTIVELY IN NUMBERED PARAGRAPHS 1-3, "CONTRACTOR") ACTUAL OR ALLEGED NEGLIGENCE OR INTENTIONAL ACTS OR OMISSIONS;**



(2) THE CITY'S AND CONTRACTOR'S ACTUAL OR ALLEGED CONCURRENT NEGLIGENCE, WHETHER CONTRACTOR IS IMMUNE FROM LIABILITY OR NOT; AND

(3) THE CITY'S AND CONTRACTOR'S ACTUAL OR ALLEGED STRICT PRODUCTS LIABILITY OR STRICT STATUTORY LIABILITY, WHETHER CONTRACTOR IS IMMUNE FROM LIABILITY OR NOT.

CONTRACTOR SHALL DEFEND, INDEMNIFY, AND HOLD THE CITY HARMLESS DURING THE TERM OF THIS AGREEMENT AND FOR FOUR YEARS AFTER THE AGREEMENT TERMINATES. CONTRACTOR'S INDEMNIFICATION IS LIMITED TO \$500,000 PER OCCURRENCE. CONTRACTOR SHALL NOT INDEMNIFY THE CITY FOR THE CITY'S SOLE NEGLIGENCE.

**F. INDEMNIFICATION - PATENT, COPYRIGHT, TRADEMARK, AND TRADE SECRET INFRINGEMENT**

CONTRACTOR AGREES TO AND SHALL DEFEND, INDEMNIFY, AND HOLD HARMLESS THE CITY, ITS AGENTS, EMPLOYEES, OFFICERS, AND LEGAL REPRESENTATIVES (COLLECTIVELY THE "CITY") FROM ALL CLAIMS OR CAUSES OF ACTION BROUGHT AGAINST THE CITY ALLEGING THAT THE CITY'S USE OF ANY EQUIPMENT, SOFTWARE, PROCESS, OR DOCUMENTS CONTRACTOR FURNISHES DURING THE TERM OF THIS AGREEMENT INFRINGES ON A PATENT, COPYRIGHT, OR TRADEMARK, OR MISAPPROPRIATES A TRADE SECRET. CONTRACTOR SHALL PAY ALL COSTS (INCLUDING, WITHOUT LIMITATION, ATTORNEYS' FEES, COURT COSTS, AND ALL OTHER DEFENSE COSTS, AND

INTEREST) AND DAMAGES AWARDED.

CONTRACTOR SHALL NOT SETTLE ANY CLAIM ON TERMS WHICH PREVENT THE CITY FROM USING THE EQUIPMENT, SOFTWARE, PROCESS, AND DOCUMENTS WITHOUT THE CITY'S PRIOR WRITTEN CONSENT, WHICH SHALL NOT BE UNREASONABLY WITHHELD.

WITHIN 60 DAYS AFTER BEING NOTIFIED OF THE CLAIM, CONTRACTOR SHALL, AT ITS OWN EXPENSE, EITHER (1) OBTAIN FOR THE CITY THE RIGHT TO CONTINUE USING THE EQUIPMENT, SOFTWARE, PROCESS, AND DOCUMENTS OR, (2) IF BOTH PARTIES AGREE, REPLACE OR MODIFY THEM WITH COMPATIBLE AND FUNCTIONALLY EQUIVALENT PRODUCTS. IF NONE OF THESE ALTERNATIVES IS REASONABLY AVAILABLE, THE CITY MAY RETURN THE EQUIPMENT, SOFTWARE, OR DOCUMENTS, OR DISCONTINUE THE PROCESS, AND CONTRACTOR SHALL REFUND THE PURCHASE PRICE.

**G. INDEMNIFICATION - SUBCONTRACTOR'S INDEMNITY**

CONTRACTOR SHALL REQUIRE ALL OF ITS SUBCONTRACTORS (AND THEIR SUBCONTRACTORS, IF ANY) TO RELEASE AND INDEMNIFY THE CITY TO THE SAME EXTENT AND IN SUBSTANTIALLY THE SAME FORM AS ITS RELEASE AND INDEMNITY TO THE CITY.

**H. INDEMNIFICATION - PROCEDURES**

(1) Notice of Claims. If the City or Contractor receives notice of any claim or circumstances which could give rise to an indemnified loss, the receiving party shall give written notice to the other party within 30 days. The notice must include the following:

- (a) a description of the indemnification event in reasonable detail,
- (b) the basis on which indemnification may be due, and
- (c) the anticipated amount of the indemnified loss.

This notice does not estop or prevent the City from later asserting a different basis for indemnification or a different amount of indemnified loss than that indicated in the initial notice. If the City does not provide this notice within the 30-day period, it does not waive any right to indemnification except to the extent that Contractor is prejudiced, suffers loss, or incurs expense because of the delay.

(2) Defense of Claims

(a) Assumption of Defense. Contractor may assume the defense of the claim at its own expense. Contractor shall then control the defense and any negotiations to settle the claim. Within 30 days after receiving written notice of the indemnification request, Contractor must advise the City as to whether or not it will defend the claim. If Contractor does not assume the defense, the City shall assume and control the defense, and all defense expenses constitute an indemnification loss.

(b) Continued Participation. If Contractor elects to defend the claim, the City may retain separate counsel to participate in (but not control) the defense and to participate in (but not control) any settlement negotiations. Contractor may settle the claim without the consent or agreement of the City, unless it (i) would result in injunctive relief or other equitable remedies or otherwise require the City to comply with restrictions or limitations that adversely affect the City, (ii) would require the City to pay amounts that Contractor does not fund in full, (iii) would not result in the City's full and complete release from all liability to the plaintiffs or claimants who are parties to or otherwise bound by the settlement.

## I. Insurance

Contractor shall maintain in effect certain insurance coverage and shall furnish certificates of insurance, in duplicate form, before beginning its performance under this Agreement. All policies except Professional Liability and Workers' Compensation must name the City as an additional insured. The issuer of any policy (1) shall have a Certificate of Authority to transact insurance business in Texas or (2) shall be an eligible non-admitted insurer in the State of Texas and have a Best's rating of at least B+ and a Best's Financial Size Category of Class VI or better, according to the most current edition Best's Key Rating Guide. Contractor shall maintain the following insurance coverages in the following amounts:

- (1) Commercial General Liability insurance including Contractual Liability insurance:
  - \$500,000 per occurrence; \$1,000,000 aggregate
- (2) Workers' Compensation:
  - Statutory amount
- (3) Professional Liability
  - \$1,000,000 per occurrence; \$1,000,000 aggregate
- (4) Automobile Liability insurance
  - \$1,000,000 combined single limit

Defense costs are excluded from the face amount of the policy.  
Aggregate Limits are per 12-month policy period  
unless otherwise indicated.

All insurance policies must require on their face, or by endorsement, that the insurance carrier waives any rights of subrogation against the City. Contractor shall give 30-day advance written notice to the Director if any of its insurance policies are cancelled, materially changed or non-

renewed. Within the 30-day period, Contractor shall provide other suitable policies in lieu of those about to be canceled, materially changed, or nonrenewed so as to maintain in effect the required coverage. If Contractor does not comply with this requirement, the Director, at his or her sole discretion, may

- (1) immediately suspend Contractor from any further performance under this Agreement and begin procedures to terminate for default, or
- (2) purchase the required insurance with City funds and deduct the cost of the premiums from amounts due to Contractor under this Agreement.

J. Warranties

Contractor's performance shall conform to commercially reasonable standards prevailing in Harris County, Texas with respect to the scope, quality, due diligence, and care of the services and products Contractor provides under this Agreement.

K. Confidentiality - Protection of City's Interest

Contractor, its agents, employees, contractors, and subcontractors shall hold all City information, data, and documents (collectively, "the Information") that they receive, or to which they have access, in strictest confidence. Contractor, its agents, employees, contractors, and subcontractors shall not disclose, disseminate, or use the Information unless the Director authorizes it in writing. Contractor shall obtain written agreements from its agents, employees, contractors, and subcontractors which bind them to the terms in this Section.

L. Use of Work Products - City May Use All Documents

- (1) The City may use all notes, plans, computations, databases, tabulations, exhibits, photographs, reports, underlying data and other work products (collectively, the "Documents") that

Contractor prepares or obtains under this Agreement.

(2) Contractor warrants that it owns the copyright to the Documents.

(3) Contractor shall deliver the original Documents to the Director on request. Within five working days after this Agreement terminates, Contractor shall deliver to the Director the original Documents, and all other files and materials Contractor produces or gathers during its performance under this Agreement.

M. Licenses and Permits

Contractor shall obtain, maintain, and pay for all licenses, permits, and certificates including all professional licenses required by any statute, ordinance, rule, or regulation. Contractor shall immediately notify the Director of any suspension, revocation, or other detrimental action against his or her license.

N. Compliance with Laws

Contractor shall comply with all applicable state and federal laws and regulations and the City Charter and Code of Ordinances.

O. Compliance with Equal Employment Opportunity Ordinance

Contractor shall comply with the City's Equal Employment Opportunity Ordinance as set out in Exhibit "B".

P. Drug Abuse Detection and Deterrence

(1) It is the policy of the City to achieve a drug-free workforce and workplace. The manufacture, distribution, dispensation, possession, sale, or use of illegal drugs or alcohol by contractors while on City Premises is prohibited. Contractor shall comply with all the requirements and procedures set forth in the Mayor's Drug Abuse Detection and Deterrence Procedures for

Contractors, Executive Order No. 1-31 ("Executive Order"), which is incorporated into this Agreement and is on file in the City Secretary's Office.

(2) Before the City signs this Agreement, Contractor shall file with the Contract Compliance Officer for Drug Testing ("CCODT"):

- (a) a copy of its drug-free workplace policy,
- (b) the Drug Policy Compliance Agreement substantially in the form set forth in Exhibit "C," together with a written designation of all safety impact positions and,
- (c) if applicable (e.g. no safety impact positions), the Certification of No Safety Impact Positions, substantially in the form set forth in Exhibit "E."

If Contractor files a written designation of safety impact positions with its Drug Policy Compliance Agreement, it also shall file every 6 months during the performance of this Agreement or on completion of this Agreement if performance is less than 6 months, a Drug Policy Compliance Declaration in a form substantially similar to Exhibit "D." Contractor shall submit the Drug Policy Compliance Declaration to the CCODT within 30 days of the expiration of each 6-month period of performance and within 30 days of completion of this Agreement. The first 6-month period begins to run on the date the City issues its Notice to Proceed or if no Notice to Proceed is issued, on the first day Contractor begins work under this Agreement.

(3) Contractor also shall file updated designations of safety impact positions with the CCODT if additional safety impact positions are added to Contractor's employee work force.

(4) Contractor shall require that its subcontractors comply with the Executive Order, and Contractor shall secure and maintain the required documents for City inspection.

#### **IV. DUTIES OF THE CITY**

##### **A. Payment Terms**

City shall pay and Contractor shall accept an annual fee of \$64,996.50 for the services set out in Exhibit "A" during the first year of the Initial Term of this Agreement. Subject to the limit of appropriation as set out in Section IV, E of this Agreement, during subsequent years of the Initial and Renewal Terms, Contractor may request the Director in writing for a change in the annual fee of \$64,996.50, limited to the extent to which there is a change in HPL's use of OCLC's cataloging subscription services less credits due to HPL for its contributions to WorldCat Resources Sharing services. The Director is authorized to approve a change in the annual fee for a change in HPL's use of cataloging subscription services as set out above in an amount not to exceed 20% of the annual fee for the previous year. Contractor must submit its written request for a change in the annual fee to the Director, 30 days before such annual payment is due. Upon the Director's approval of the change in the annual fee, City shall pay and Contractor shall accept the revised, changed annual fee for the subsequent year of the Initial or Renewal Term when such a change is requested by Contractor and approved by the Director.

In the event the Director makes a written request to Contractor to provide training courses to City end-users designated by the Director to undergo such training, then, Contractor shall offer the courses identified by the Director in the written request to designated City end-users. The total cost of all training courses provided by Contractor in response to written requests by the Director under this Agreement must not exceed \$1,000.00 per year and \$8,000.00 for the Initial and renewal option terms set out in this Agreement.



B. Taxes

The City is exempt from payment of Federal Excise and Transportation Tax and Texas Limited Sales and Use Tax. Contractor's invoices to the City must not contain assessments of any of these taxes. The Director will furnish the City's exemption certificate and federal tax identification number to Contractor if requested.

C. Method of Payment

The City shall pay on the basis of annual invoices submitted by Contractor and approved by the Director, showing the services performed and the attendant fee. In the event the Director makes a written request to Contractor to provide training courses, then Contractor shall submit invoices showing the courses provided and the cost of such courses at the end of the month in which it provides such courses. The City shall pay Contractor within 30 days of the receipt and approval of the invoices.

D. Method of Payment - Disputed Payments

If the City disputes any items in an invoice Contractor submits for any reason, including lack of supporting documentation, the Director shall temporarily delete the disputed item and pay the remainder of the invoice. The Director shall promptly notify Contractor of the dispute and request remedial action. After the dispute is settled, Contractor shall include the disputed amount on a subsequent regularly scheduled invoice or on a special invoice for the disputed item only.

E. Limit of Appropriation

(1) The City's duty to pay money to Contractor under this Agreement is limited in its entirety by the provisions of this Section.

(2) In order to comply with Article II, Sections 19 and 19a of the City's Charter and Article XI, Section 5 of the Texas Constitution, the City has appropriated and allocated the sum of

\$0 to pay money due under this Agreement (the "Original Allocation"). The executive and legislative officers of the City, in their discretion, may allocate supplemental funds for this Agreement, but they are not obligated to do so. Therefore, the parties have agreed to the following procedures and remedies:

(3) The City makes a Supplemental Allocation by issuing to Contractor a Service Release Order, or similar form approved by the City Controller, containing the language set out below. When necessary, the Supplemental Allocation shall be approved by motion or ordinance of City Council.

#### **NOTICE OF SUPPLEMENTAL ALLOCATION OF FUNDS**

By the signature below, the City Controller certifies that, upon the request of the responsible director, the supplemental sum set out below has been allocated for the purposes of the Agreement out of funds appropriated for this purpose by the City Council of the City of Houston. This supplemental allocation has been charged to such appropriation.

\$ \_\_\_\_\_

(4) The Original Allocation plus all supplemental allocations are the Allocated Funds. The City shall never be obligated to pay any money under this Agreement in excess of the Allocated Funds. Contractor must assure itself that sufficient allocations have been made to pay for services it provides. If Allocated Funds are exhausted, Contractor's only remedy is suspension or termination of its performance under this Agreement, and it has no other remedy in law or in equity against the City and no right to damages of any kind.

#### **V. TERM AND TERMINATION**

A. Contract Term

This Agreement is effective on the Countersignature Date and remains in effect for five years unless sooner terminated under this Agreement (the "Initial Term").

B. Renewals

Upon expiration of the Initial Term, and so long as the City makes sufficient supplemental allocations, this Agreement will be automatically renewed for three successive one-year terms on the same terms and conditions, except pricing. If the Director or the City chooses not to renew this Agreement, the Director shall notify Contractor of non-renewal at least 30 days before the expiration of the then-current term.

At the end of the third successive one-year term, if the Director extends this Agreement to permit Contractor to complete its performance, then, the Director may in his or her sole discretion extend the time so long as such extension does not exceed 90 days. The 90-day extension of time does not require an amendment of the Agreement and Contractor is not entitled to damages for delay(s) regardless of the cause of such delay(s).

C. Termination for Convenience by City

The Director may terminate this Agreement at any time by giving 30 days written notice to Contractor. The City's right to terminate this Agreement for convenience is cumulative of all rights and remedies which exist now or in the future.

On receiving the notice, Contractor shall, unless the notice directs otherwise, immediately discontinue all services under this Agreement and cancel all existing orders and subcontracts that are chargeable to this Agreement. As soon as practicable after receiving the termination notice, Contractor shall submit an invoice showing in detail the services performed under

this Agreement up to the termination date. The City shall then pay the fees to Contractor for services actually performed, but not already paid for, in the same manner as prescribed in Section IV, A unless the fees exceed the allocated funds remaining under this Agreement.

TERMINATION OF THIS AGREEMENT AND RECEIPT OF PAYMENT FOR SERVICES RENDERED ARE CONTRACTOR'S ONLY REMEDIES FOR THE CITY'S TERMINATION FOR CONVENIENCE, WHICH DOES NOT CONSTITUTE A DEFAULT OR BREACH OF THIS AGREEMENT. CONTRACTOR WAIVES ANY CLAIM (OTHER THAN ITS CLAIM FOR PAYMENT AS SPECIFIED IN THIS SECTION), IT MAY HAVE NOW OR IN THE FUTURE FOR FINANCIAL LOSSES OR OTHER DAMAGES RESULTING FROM CITY'S TERMINATION FOR CONVENIENCE.

D. Termination for Cause

If Contractor defaults under this Agreement, the Director may either terminate this Agreement or allow Contractor to cure the default as provided below. The City's right to terminate this Agreement for Contractor's default is cumulative of all rights and remedies which exist now or in the future. Default by Contractor occurs if:

- (1) Contractor fails to perform any of its duties under this Agreement;
- (2) Contractor becomes insolvent;
- (3) all or a substantial part of Contractor's assets are assigned for the benefit of its creditors; or
- (4) a receiver or trustee is appointed by Contractor.

If a default occurs, the Director may, but is not obligated to, deliver a written notice to Contractor describing the default and the termination date. The Director, at his or her sole option,

may extend the termination date to a later date. If the Director allows Contractor to cure the default and Contractor does so to the Director's satisfaction before the termination date, then the termination is ineffective. If Contractor does not cure the default before the termination date, then the Director may terminate this Agreement on the termination date, at no further obligation of the City.

To effect final termination, the Director must notify Contractor in writing. After receiving the notice, Contractor shall, unless the notice directs otherwise, immediately discontinue all services under this Agreement, and promptly cancel all orders or subcontracts chargeable to this Agreement.

## **VI. MISCELLANEOUS**

### **A. Independent Contractor**

Contractor is an independent contractor and shall perform the services provided for in this Agreement in that capacity. The City has no control or supervisory powers over the manner or method of Contractor's performance under this Agreement. All personnel Contractor uses or provides are its employees or subcontractors and not the City's employees, agents, or subcontractors for any purpose whatsoever. Contractor is solely responsible for the compensation of its personnel, including but not limited to: the withholding of income, social security, and other payroll taxes and all workers' compensation benefits coverage.

### **B. Force Majeure**

1. Timely performance by both parties is essential to this Agreement. However, neither party is liable for reasonable delays in performing its obligations under this Agreement to the extent the delay is caused by Force Majeure that directly impacts the City or Contractor. The event of Force Majeure may permit a reasonable delay in performance but does not excuse a party's obligations

to complete performance under this Agreement. Force Majeure means: fires, interruption of utility services, epidemics in the City, floods, hurricanes, tornadoes, ice storms and other natural disasters, explosions, war, terrorist acts against the City or Contractor, riots, strikes, court orders, and the acts of superior governmental or military authority, and which the affected party is unable to prevent by the exercise of reasonable diligence. The term does not include any changes in general economic conditions such as inflation, interest rates, economic downturn or other factors of general application; or an event that merely makes performance more difficult, expensive or impractical. Force Majeure does not entitle Contractor to extra Reimbursable Expenses or payment.

2. This relief is not applicable unless the affected party does the following:

- (a) uses due diligence to remove the effects of the Force Majeure as quickly as possible and to continue performance notwithstanding the Force Majeure; and
- (b) provides the other party with prompt written notice of the cause and its anticipated effect.

3. The Director will review claims that a Force Majeure that directly impacts the City or Contractor has occurred and render a written decision within 14 days. The decision of the Director is final.

4. The City may perform contract functions itself or contract them out during periods of Force Majeure. Such performance is not a default or breach of this Agreement by the City.

5. If the Force Majeure continues for more than 10 days from the date performance is affected, the Director may terminate this Agreement by giving 7 days' written notice to Contractor. This termination is not a default or breach of this Agreement. **CONTRACTOR**

**WAIVES ANY CLAIM IT MAY HAVE FOR FINANCIAL LOSSES OR OTHER DAMAGES RESULTING FROM THE TERMINATION EXCEPT FOR AMOUNTS DUE UNDER THE AGREEMENT UP TO THE TIME THE WORK IS HALTED DUE TO FORCE MAJEURE.**

C. Severability

If any part of this Agreement is for any reason found to be unenforceable, all other parts remain enforceable unless the result materially prejudices either party.

D. Entire Agreement

This Agreement merges the prior negotiations and understandings of the Parties and embodies the entire agreement of the Parties. No other agreements, assurances, conditions, covenants (express or implied), or other terms of any kind, exist between the Parties regarding this Agreement.

E. Written Amendment

Unless otherwise specified elsewhere in this Agreement, this Agreement may be amended only by written instrument executed on behalf of the City (by authority of an ordinance adopted by the City Council) and Contractor. The Director is only authorized to perform the functions specifically delegated to him or her in this Agreement.

F. Applicable Laws

This Agreement is subject to the laws of the State of Texas, the City Charter and Ordinances, the laws of the federal government of the United States, and all rules and regulations of any regulatory body or officer having jurisdiction.

Venue for any litigation relating to this Agreement is Harris County, Texas.

G. Notices

All notices required or permitted by this Agreement must be in writing and are deemed delivered on the earlier of the date actually received or the third day following: (1) deposit in a United States Postal Service post office or receptacle; (2) with proper postage (certified mail, return receipt requested); and (3) addressed to the other party at the address set out in the preamble of this Agreement or at such other address as the receiving party designates by proper notice to the sending party.

H. Captions

Captions contained in this Agreement are for reference only, and therefore, have no effect in construing this Agreement. The captions are not restrictive of the subject matter of any section in this Agreement.

I. Non-Waiver

If either party fails to require the other to perform a term of this Agreement, that failure does not prevent the party from later enforcing that term and all other terms. If either party waives the other's breach of a term, that waiver does not waive a later breach of this Agreement.

An approval by the Director, or by any other employee or agent of the City, of any part of Contractor's performance does not waive compliance with this Agreement or establish a standard of performance other than that required by this Agreement and by law. The Director is not authorized to vary the terms of this Agreement.

J. Inspections and Audits

City representatives may perform, or have performed, (1) audits of Contractor's books and records, and (2) inspections of all places where work is undertaken in connection with this



Agreement. Contractor shall keep its books and records available for this purpose for at least 4 years after this Agreement terminates. This provision does not affect the applicable statute of limitations.

K. Enforcement

The City Attorney or his or her designee may enforce all legal rights and obligations under this Agreement without further authorization. Contractor shall provide to the City Attorney all documents and records that the City Attorney requests to assist in determining Contractor's compliance with this Agreement, with the exception of those documents made confidential by federal or State law or regulation.

L. Ambiguities

If any term of this Agreement is ambiguous, it shall not be construed for or against any party on the basis that the party did or did not write it.

M. Survival

Contractor shall remain obligated to the City under all clauses of this Agreement that expressly or by their nature extend beyond the expiration or termination of this Agreement, including but not limited to, the indemnity provisions.

N. Publicity

Contractor shall make no announcement or release of information concerning this Agreement unless the release has been submitted to and approved, in writing, by the Director.

O. Parties In Interest

This Agreement does not bestow any rights upon any third party, but binds and benefits the City and Contractor only.

P. Successors and Assigns

This Agreement binds and benefits the Parties and their legal successors and permitted assigns; however, this provision does not alter the restrictions on assignment and disposal of assets set out in the following paragraph. This Agreement does not create any personal liability on the part of any officer or agent of the City.

Q. Business Structure and Assignments

Contractor shall not assign this Agreement at law or otherwise or dispose of all or substantially all of its assets without the Director's prior written consent. Nothing in this clause, however, prevents the assignment of accounts receivable or the creation of a security interest as described in §9.406 of the Texas Business & Commerce Code. In the case of such an assignment, Contractor shall immediately furnish the City with proof of the assignment and the name, telephone number, and address of the Assignee and a clear identification of the fees to be paid to the Assignee.

Contractor shall not delegate any portion of its performance under this Agreement without the Director's prior written consent.

R. Remedies Cumulative

Unless otherwise specified elsewhere in this Agreement, the rights and remedies contained in this Agreement are not exclusive, but are cumulative of all rights and remedies which exist now or in the future. Neither party may terminate its duties under this Agreement except in accordance with its provisions.

S. CONTRACTOR DEBT

IF CONTRACTOR, AT ANY TIME DURING THE TERM OF THIS AGREEMENT, INCURS A DEBT, AS THE WORD IS DEFINED IN SECTION 15-122 OF THE

HOUSTON CITY CODE OF ORDINANCES, IT SHALL IMMEDIATELY NOTIFY THE CITY CONTROLLER IN WRITING. IF THE CITY CONTROLLER BECOMES AWARE THAT CONTRACTOR HAS INCURRED A DEBT, HE SHALL IMMEDIATELY NOTIFY CONTRACTOR IN WRITING. IF CONTRACTOR DOES NOT PAY THE DEBT WITHIN 30 DAYS OF EITHER SUCH NOTIFICATION, THE CITY CONTROLLER MAY DEDUCT FUNDS IN AN AMOUNT EQUAL TO THE DEBT FROM ANY PAYMENTS OWED TO CONTRACTOR UNDER THIS AGREEMENT, AND CONTRACTOR WAIVES ANY RECOURSE THEREFOR. CONTRACTOR SHALL FILE A NEW AFFIDAVIT OF OWNERSHIP, USING THE FORM DESIGNATED BY CITY, BETWEEN FEBRUARY 1 AND MARCH 1 OF EVERY YEAR DURING THE TERM OF THIS AGREEMENT.

## **EXHIBIT "A"**

### **SCOPE OF SERVICES**

1. Contractor shall provide HPL with OCLC cataloging subscription services under the terms of this Agreement and the OCLC Services Agreement set out in Exhibit "F," that include:
  - a. Access to its WorldCat database to enable HPL to access cataloging records from other member libraries and institutions from around the world; and
  - b. Choice of cataloging services for finding and downloading records quickly and with ease by using its Connexion, CatExpress, and Z39.50 Cataloging services to enable HPL to set holdings, update its records in WorldCat and to allow its holdings to remain widely visible to users.
2. Contractor shall provide HPL with its access subscription that goes along with its OCLC Cataloging service to enable HPL to use its database infrastructure.
3. In addition to the above two types of subscription services, Contractor shall provide HPL with continued use of its WorldCat Resources Sharing service to enable HPL to create, send, manage and track interlibrary loan requests and document orders using the WorldCat database; and continue providing streamlined workflows for efficient completion of borrowing and lending with local, regional, or global libraries.

#### **4. REFERENCE SUPPORT OF EXPERTS**

Contractor shall provide HPL with access to its expert support personnel through a variety of means, including:

- a. via its toll-free telephone number: (800) 848-5800 (Contractor shall provide the Director with 30 days' written notice about a change in the above telephone number);
- b. via email at: [support@oclc.org](mailto:support@oclc.org); and
- c. via its online support system by submitting an online support form at <https://www3.oclc.org/app/contac>.

#### **5. TRAINING**

In consultation with the Director and for fees not to exceed \$1,000.00 per year as set out in Section IV, A, Contractor shall offer HPL with flexible, customizable online and face-to-face training courses on a variety of library management topics. In addition, Contractor shall offer HPL access to the OCLC Training Portal, <http://training.oclc.org/1>, to enable HPL to select training courses on how to use its products. Contractor shall offer HPL discounts on various training courses, in the event HPL qualifies for such discounts, based on HPL's affiliations with the training providers offering such training courses.

**EXHIBIT "B"**  
**EQUAL EMPLOYMENT OPPORTUNITY**

1. The contractor, subcontractor, vendor, supplier, or lessee will not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin, or age. The contractor, subcontractor, vendor, supplier, or lessee will take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, religion, color, sex, national origin, or age. Such action will include, but not be limited to, the following: employment; upgrading; demotion or transfer; recruitment advertising; layoff or termination; rates of pay or other forms of compensation and selection for training, including apprenticeship. The contractor, subcontractor, vendor, supplier or lessee agrees to post in conspicuous places available to employees, and applicants for employment, notices to be provided by the City setting forth the provisions of this Equal Employment Opportunity Clause.

2. The contractor, subcontractor, vendor, supplier, or lessee states that all qualified applicants will receive consideration for employment without regard to race, religion, color, sex, national origin or age.

3. The contractor, subcontractor, vendor, supplier, or lessee will send to each labor union or representatives of workers with which it has a collective bargaining agreement or other contract or understanding, a notice to be provided by the agency contracting officer advising the said labor union or worker's representative of the contractor's and subcontractor's commitments under Section 202 of Executive Order No. 11246, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

4. The contractor, subcontractor, vendor, supplier, or lessee will comply with all provisions of Executive Order No. 11246 and the rules, regulations, and relevant orders of the Secretary of Labor or other Federal Agency responsible for enforcement of the equal employment opportunity and affirmative action provisions applicable and will likewise furnish all information and reports required by the Mayor and/or Contractor Compliance Officer(s) for purposes of investigation to ascertain and effect compliance with this program.

5. The contractor, subcontractor, vendor, supplier, or lessee will furnish all information and reports required by Executive Order No. 11246, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to all books, records, and accounts by the appropriate City and Federal Officials for purposes of investigations to ascertain compliance with such rules, regulations, and orders. Compliance reports filed at such times as directed shall contain information as to the employment practice policies, program, and work force statistics of the contractor, subcontractor, vendor, supplier, or lessee.

6. In the event of the contractor's, subcontractor's, vendor's, supplier's, or lessee's non-compliance with the non-discrimination clause of this contract or with any of such rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part, and the contractor, subcontractor, vendor, supplier, or lessee may be declared ineligible for further City contracts in accordance with procedures provided in Executive Order No. 11246, and such other sanctions may be imposed and remedies invoked as provided in the said Executive Order, or by rule, regulation, or order of the Secretary of Labor, or as may otherwise be provided by law.

7. The contractor shall include the provisions of paragraphs 1-8 of this Equal Employment Opportunity Clause in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontractor or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance; provided, however, that in the event the contractor becomes involved in, or is threatened with litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

8. The contractor shall file and shall cause his or her subcontractors, if any, to file compliance reports with the City in the form and to the extent as may be prescribed by the Mayor. Compliance reports filed at such times as directed shall contain information as to the practices, policies, programs, and employment policies and employment statistics of the contractor and each subcontractor.

**EXHIBIT "C"**  
**DRUG POLICY COMPLIANCE AGREEMENT**

I, James T. Houfek Vice President as an owner or officer of  
(Name) (Print/Type) (Title)  
oclcOnline Computer Library Center, Inc. (Contractor)  
(Name of Company)

have authority to bind Contractor with respect to its bid, offer or performance of any and all contracts it may enter into with the City of Houston; and that by making this Agreement, I affirm that the Contractor is aware of and by the time the contract is awarded will be bound by and agree to designate appropriate safety impact positions for company employee positions, and to comply with the following requirements before the City issues a notice to proceed:

1. Develop and implement a written Drug Free Workplace Policy and related drug testing procedures for the Contractor that meet the criteria and requirements established by the Mayor's Amended Policy on Drug Detection and Deterrence (Mayor's Drug Policy) and the Mayor's Drug Detection and Deterrence Procedures for Consultants (Executive Order No. 1-31).
2. Obtain a facility to collect urine samples consistent with Health and Human Services (HHS) guidelines and a HHS certified drug testing laboratory to perform the drug tests.
3. Monitor and keep records of drug tests given and the results; and upon request from the City of Houston, provide confirmation of such testing and results.
4. Submit semi-annual Drug Policy Compliance Declarations.

I affirm on behalf of the Contractor that full compliance with the Mayor's Drug Policy and Executive Order No. 1-31 is a material condition of the contract with the City of Houston.

I further acknowledge that falsification, failure to comply with or failure to timely submit declarations and/or documentation in compliance with the Mayor's Drug Policy and/or Executive Order No. 1-31 will be considered a breach of the contract with the City and may result in non-award or termination of the contract by the City of Houston.

3/24/11  
Date

oclcOnline Computer Library Center, Inc  
Contractor Name  
[Signature]  
Signature  
Vice President  
Title

**EXHIBIT "D"**  
**DRUG POLICY COMPLIANCE DECLARATION**

I, James T. Houfek Vice President as an owner or officer of  
(Name) (Print/Type) (Title)  
OCIC Online Computer Library Center Inc. (Contractor)  
(Name of Company)

have personal knowledge and full authority to make the following declarations:

N/A

This reporting period covers the preceding 6 months from \_\_\_\_\_ to \_\_\_\_\_, 19\_\_\_\_.

\_\_\_\_\_  
Initials A written Drug Free Workplace Policy has been implemented and employees notified.  
The policy meets the criteria established by the Mayor's Amended Policy on Drug Detection  
and Deterrence (Mayor's Policy).

\_\_\_\_\_  
Initials Written drug testing procedures have been implemented in conformity with the Mayor's  
Drug Detection and Deterrence Procedures for Contractors, Executive Order No. 1-31.  
Employees have been notified of such procedures.

\_\_\_\_\_  
Initials Collection/testing has been conducted in compliance with federal Health and Human  
Services (HHS) guidelines.

\_\_\_\_\_  
Initials Appropriate safety impact positions have been designated for employee positions  
performing on the City of Houston contract. The number of employees in safety impact  
positions during this reporting period is \_\_\_\_\_.

\_\_\_\_\_  
Initials From \_\_\_\_\_ to \_\_\_\_\_ the following test has occurred  
(Start date) (End date)

	<u>Random</u>	<u>Reasonable Suspicion</u>	<u>Post Accident</u>	<u>Total</u>
Number Employees Tested	_____	_____	_____	_____
Number Employees Positive	_____	_____	_____	_____
Percent Employees Positive	_____	_____	_____	_____

\_\_\_\_\_  
Initials

Any employee who tested positive was immediately removed from the City worksite consistent with the Mayor's Policy and Executive Order No. 1-31.

\_\_\_\_\_  
Initials

I affirm that falsification or failure to submit this declaration timely in accordance with established guidelines will be considered a breach of contract.

I declare under penalty of perjury that the affirmations made herein and all information contained in this declaration are within my personal knowledge and are true and correct.

3/24/11  
(Date)

JAMES T. HAUFEK  
(Typed or Printed Name)

[Signature]  
(Signature)

VICE PRESIDENT  
(Title)



EXHIBIT "E"

CONTRACTOR'S CERTIFICATION  
OF NO SAFETY IMPACT POSITIONS  
IN PERFORMANCE OF A CITY CONTRACT

James T. Houfek Vice President/General Counsel  
(Name) (Title)  
as an owner or officer of OCLC Online Computer Library Center, Inc.  
(Name of Company) (Contractor)

have authority to bind the Contractor with respect to its bid, and hereby certify that Contractor has no employee safety impact positions, as defined in §5.18 of Executive Order No. 1-31, that will be involved in performing online bibliographic subscription services  
(Project)

Contractor agrees and covenants that it shall immediately notify the City of Houston Director of Personnel if any safety impact positions are established to provide services in performing this City Contract.

3/24/11  
(Date)

James T. Houfek  
(Typed or Printed Name)  
[Signature]  
(Signature)  
Vice President/General Counsel  
(Title)

**EXHIBIT “F”**

**OCLC SERVICES AGREEMENT**



The world's libraries.  
Connected.

# OCLC SERVICES AGREEMENT

Please print or type

User to be invoiced by: ☒ OCLC; or ☐ Billing Partner: \_\_\_\_\_  
(Name)

INSTITUTION NAME ("User") Houston Public Library			
LIBRARY NAME (if different from Institution Name)			OCLC HOLDINGS SYMBOL (if any) TXN
STREET ADDRESS 500 McKinney			
CITY Houston	STATE TX	ZIP/POSTAL CODE 77002	COUNTRY USA
CONTACT PERSON Syma Zerkow		TITLE Chief of Library Materials Services	
TELEPHONE NUMBER 832-393-1484	FAX NUMBER 832-393-1590	E-MAIL ADDRESS Syma.zerkow@houstontx.gov	
<b>BILLING ADDRESS (IF DIFFERENT FROM ABOVE)</b>			
INSTITUTION NAME Houston Public Library			
STREET ADDRESS 500 McKinney			
CITY Houston	STATE TX	ZIP/POSTAL CODE 77002	COUNTRY USA
CONTACT PERSON Pat Ogea		TITLE Serials Librarian	
TELEPHONE NUMBER 832-393-1608	FAX NUMBER 832-393-1590	E-MAIL ADDRESS Pat.ogea@houstontx.gov	
Is User considered exempt from tax in the country in which it is located? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No			
By signing this form, User: (1) acknowledges that User has read and agrees to the terms of this Agreement to become effective upon OCLC acceptance of User's order; (2) warrants that it has made <u>no changes</u> to the terms of this Agreement; (2) orders access to the OCLC System, and such other OCLC Services as User may specify; and (3) warrants that it has the authority to enter into this Agreement on behalf of itself and each Designated Library.			
INSTITUTION ("USER"): <u>Houston Public Library</u>			
Authorized Signature: <u>Syma Zerkow</u>		Date: <u>2/24/11</u>	
Title: <u>Chief of Library Materials Services</u>			
Accepted By: OCLC ONLINE COMPUTER LIBRARY CENTER, INC.			
_____ Bruce A. Crocco, Vice President		Date: _____	



**3.2.** User and each Designated Library using the OCLC System for cataloging agrees to: (i) contribute to WorldCat all current metadata and holdings information which represents items in their collections; (ii) support prompt contribution of bibliographic records and related data to promote shared use of records and library resources; and (iii) cooperate with OCLC, OCLC partner organizations and OCLC member libraries to identify and correct errors in contributed information and to avoid introducing duplicate records into WorldCat.

**3.3.** User agrees that it will not, and will not permit any Designated Library to, access the OCLC System to perform services or provide assistance for or on behalf of any third-party, except with OCLC's prior written consent; provided, however, that such use for third-parties is permitted (a) where it generates an interlibrary loan request on the OCLC interlibrary loan subsystem and (b) where an OCLC-authorized processing center participant carries out cataloging activities on behalf of its client users. User or a Designated Library is an authorized processing center participant only if it so states elsewhere in this Agreement or in a separate written agreement with OCLC.

**3.4.** User and each Designated Library shall be responsible for arranging for and providing, at its expense, Internet and other telecommunications connections necessary for accessing the OCLC System.

**3.5.** User will not obtain, or permit a Designated Library to obtain, catalog records from WorldCat unless User's or the Designated Library's (as applicable) OCLC-assigned holdings symbol has been accurately attached to such records in WorldCat.

**3.6. Ownership and Use of the OCLC System.**

**A.** Except as permitted in a separate agreement between User and OCLC, User and Designated Libraries will not cause or permit any equipment or device to be directly or indirectly attached, linked or used with the OCLC System.

**B.** User and Designated Libraries will not make or permit any application or use of the OCLC System not expressly permitted by this Agreement, and will not, as a result of its activities hereunder, acquire any copyright, patent, secrecy or other proprietary right in or to the OCLC System, OCLC Services or WorldCat.

**C.** Any Internet or other telecommunications connections, software or equipment utilized by User or a Designated Library to access and use the OCLC System shall be without adverse effect on the OCLC System.

**3.7. OCLC Membership.**

User and each Designated Library meeting the requirements for OCLC membership established by OCLC from time to time in accordance with OCLC's then-current governance structure and set forth in the then-current version of OCLC's Membership and Governance Protocols shall become an OCLC member. The current version of OCLC's Membership and Governance Protocols is located at

[http://www.oclc.org/us/en/membership/membership\\_protocols.pdf](http://www.oclc.org/us/en/membership/membership_protocols.pdf).

As a condition of obtaining and retaining status as an OCLC member, User and each Designated Library shall comply on an ongoing basis with all protocols, requirements, procedures and policies applicable to OCLC members established by OCLC.

**SECTION 4. OCLC CHARGES**

**4.1. Payments and Discount.** User and/or each Designated Library (as appropriate) will pay OCLC or, if applicable, OCLC's billing partner, in the currency set forth in OCLC's then-current price list, or such other currency as may be deemed acceptable by OCLC (at an approved conversion rate), the aggregate charges for access, processes, products, license(s) and services furnished by OCLC under this Agreement, as set forth in OCLC's price list(s) in effect at the time of each transaction, copies of which price list(s) will be provided to User when issued.

**4.2. Modification of Charges.** OCLC may modify or add new such charges for existing processes, products and services, or change the form or method of charging, upon at least thirty (30) calendar days prior notice to User.

**4.3. Taxes and Other Charges.** All charges under this Agreement are exclusive of sales, use, excise and similar taxes and of customs, tariffs, impost fees and similar charges which may be

applicable to the transactions dealt within this Agreement, all of which taxes, and charges, together with interest and penalties thereon, shall be for the account of User and/or each Designated Library (as appropriate) and reimbursed to OCLC. Such taxes and charges for which claims or assessments could be made against OCLC may be added to invoices to User and/or Designated Libraries (as appropriate) unless evidence of a valid exemption has been furnished to OCLC by User or the Designated Library. User may, at its own expense and in OCLC's name, challenge or seek abatement or refund of taxes for which it or a Designated Library is liable hereunder. OCLC shall cooperate with User in that regard by providing all relevant information that is available to OCLC. Each party's obligations under this Section 4.3 shall survive the expiration or termination of this Agreement. If User or a Designated Library withholds any taxes from any payment, then the price payable hereunder shall be deemed increased to an amount which, when reduced by the tax withheld from that amount, equals the full OCLC price otherwise due. For example, if the Agreement provides for a payment of One Hundred monetary units, and User or a Designated Library elects to withhold a twenty percent (20%) tax, then the contract price will be deemed to be One Hundred Twenty-five monetary units, of which One Hundred monetary units will be paid to OCLC and Twenty-five monetary units withheld as taxes.

**SECTION 5. USE AND TRANSFER OF RECORDS**

**5.1. User's Rights and Responsibilities.** User agrees that the use and transfer by the User and Designated Libraries of WorldCat Data received from OCLC or otherwise obtained during the term of this or a preceding agreement with OCLC or an OCLC-affiliated distributor, network or organization is subject to the Policy. However, if, within sixty (60) days after the effective date of a modified version of the Policy, User gives OCLC notice of termination of this Agreement in accordance with the terms hereof then the new version of the Policy will not replace the existing version as to User and Designated Libraries.

**5.2. Subsequent Restrictions.** If, during the term hereof, an institution from which OCLC acquires bibliographic records for addition to WorldCat informs OCLC that records it thereafter furnishes to OCLC will be subject to usage or transfer restrictions beyond or in addition to those applicable under this Section 5, and if OCLC nevertheless elects to accept such records for addition to the OCLC database, it will so notify User, with full details, after which, User's and Designated Libraries' rights to access, use and transfer such records will be subject to said usage and transfer restrictions. If, at any time during the sixty (60) day period after receipt of the notification from OCLC of such usage and/or transfer restrictions, User terminates this Agreement under Section 9 hereof, then, after giving its termination notice to OCLC, User will be under no further obligation (if any) to make or cause Designated Libraries to make cataloging use of any of the records which are subject to such restrictions.

**5.3. Survival.** The obligations under this Section 5 shall survive the expiration or termination of this Agreement.

**SECTION 6. WARRANTIES AND LIMITATIONS OF LIABILITY**

**6.1. Limited Warranty.** OCLC/MARC subscription data files and other Offline Products will, at the delivery thereof, be free of errors or defects caused by OCLC or its suppliers. If any such products prove, within sixty (60) days after receipt of the item or seventy-five (75) days after shipment as evidenced by OCLC's record of shipment, to have contained such defects or errors upon delivery, or are damaged or lost in transit, OCLC will either replace the item by reproducing it free of charge or, at OCLC's option, by requiring new online transactions with issuance of full credit. All other products and services are warranted as mutually agreed from time to time in the applicable order and agreement forms. THE FOREGOING OBLIGATIONS AS SET FORTH IN THIS SECTION 6.1 REPRESENT OCLC'S SOLE AND EXCLUSIVE LIABILITY FOR ANY DEFECT OR FAILURE IN OCLC/MARC SUBSCRIPTION DATA FILES AND OTHER OFFLINE PRODUCTS FURNISHED HEREUNDER OR UNDER THE APPLICABLE ORDER AND AGREEMENT FORMS REFERRED TO HEREIN.

**6.2 Other Agreements.** User warrants to OCLC that entering into this Agreement will not breach the terms and conditions of any agreement to which User or a Designated Library is a party.

**6.3. DISCLAIMER.** EXCEPT FOR THE EXPRESS WARRANTIES STATED IN THIS SECTION 6, OCLC MAKES NO EXPRESS OR IMPLIED REPRESENTATIONS OR WARRANTIES WITH RESPECT TO THE OCLC SYSTEM OR OCLC SERVICES. ALL OTHER WARRANTIES, INCLUDING THE WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR USE OR PURPOSE ARE HEREBY DISCLAIMED. OCLC SHALL NOT BE LIABLE FOR INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES, EVEN IF ADVISED OF THE POSSIBILITY THEREOF AND REGARDLESS OF THE FORM OF ACTION, NOR SHALL IT BE LIABLE FOR EXEMPLARY DAMAGES, LOST REVENUE OR LOST DATA. OCLC SHALL NOT BE LIABLE TO USER OR ANY DESIGNATED LIBRARY FOR ANY ERRORS IN WORLDCAT CAUSED BY THE PARTIES FROM WHICH RECORDS ARE RECEIVED OR ACQUIRED FOR INCLUSION IN WORLDCAT. IN NO EVENT, EVEN IF THE EXCLUSIVITY OR LIMITATIONS OF LIABILITY OR REMEDIES SET FORTH ABOVE ARE HELD TO BE UNENFORCEABLE FOR ANY REASON, SHALL OCLC'S TOTAL LIABILITY TO USER OR A DESIGNATED LIBRARY IN RESPECT OF ANY CLAIM, REGARDLESS OF THE FORM OF ACTION, EXCEED A REFUND OF PAYMENTS MADE BY USER OR THE DESIGNATED LIBRARY (AS APPLICABLE) TO OCLC UNDER THIS AGREEMENT FOR: (i) THE OCLC SERVICE GIVING RISE TO THE CLAIM FOR THE THEN-CURRENT SUBSCRIPTION YEAR; OR (ii) THE TRANSACTION GIVING RISE TO THE CLAIM (AS APPLICABLE GIVEN THE NATURE OF THE RELEVANT OCLC SERVICE).

## **SECTION 7. INFRINGEMENT UNDERTAKINGS AND GRANT OF LICENSE**

**7.1. By OCLC.** OCLC agrees to defend and assume all of User's or Designated Library's (as applicable) liability, costs and expenses for any suit or claim brought or asserted against User or Designated Library on the ground that use of OCLC Online Processes, Offline Products or services, as furnished by OCLC hereunder or under the separate or supplementary agreements referred to in this Agreement, infringes any patent, copyright, trademark, secrecy or other proprietary interest of third parties, provided and upon the conditions that User or the Designated Library (as applicable) (i) promptly delivers to OCLC written notice of any claim of such infringement together with all infringement notices and other papers received by User or the Designated Library and (ii) gives OCLC all information and assistance reasonably requested, together with exclusive authority to investigate, settle and defend such claim. User or Designated Library may retain legal counsel, at its own expense, to participate in such defense provided doing so does not diminish OCLC's primary authority to conduct such investigation, defense and settlement negotiations. THE FOREGOING SETS FORTH OCLC'S ENTIRE LIABILITY TO USER AND DESIGNATED LIBRARIES FOR ANY ACTUAL OR ALLEGED INFRINGEMENT OF THE TYPES DEALT WITH IN THIS SECTION 7.

**7.2. By User.** User and/or Designated Library (as applicable) agrees to defend and assume all of OCLC's liability, costs and expenses for any suit or claim brought or asserted against OCLC on the ground that any information or data furnished to OCLC by User or a Designated Library, including any use, reproduction or transfer thereof by OCLC or its designees, infringes any copyright, trademark, secrecy or other proprietary interest of third parties, provided and upon the conditions that OCLC (i) promptly delivers to User or Designated Library written notice of any claim of such infringement, together with all infringement notices and other papers received by OCLC and (ii) gives User or Designated Library all information and assistance reasonably requested, together with exclusive authority to investigate, settle and defend such claim. OCLC may retain legal counsel, at its own expense, to participate in such defense provided doing so does not diminish User's or Designated Library's primary authority to conduct such investigation, defense and settlement negotiations. THE FOREGOING SETS FORTH USER'S AND DESIGNATED LIBRARY'S ENTIRE LIABILITY TO

OCLC FOR ANY ACTUAL OR ALLEGED INFRINGEMENT OF THE TYPES DEALT WITH IN THIS SECTION 7.

**7.3. License Grant.** User and each Designated Library hereby grants to OCLC, other OCLC participants, non-participant users and OCLC designees an irrevocable, nonexclusive, royalty-free, sublicenseable, transferable, world-wide right to copy, display, publish, prepare derivative works from, distribute and use (in compilations and otherwise) all bibliographic records, holdings and other information supplied to OCLC during the term of this Agreement by User or such Designated Library (or any entity acting on its/their behalf) under any copyright, patent, secrecy or other proprietary right therein owned or controlled by User and/or such Designated Library. User and each Designated Library warrants to OCLC that it has all rights necessary to grant the license set forth in this Section 7.3.

**7.4. Survival of Rights and Obligations.** The rights and obligations under this Section 7 shall survive any expiration or termination of this Agreement.

## **SECTION 8. RESPONSIBLE USE**

User agrees to comply, and to cause each Designated Library to comply, with any code of responsible use adopted by OCLC, a copy of which will be provided to User upon request, and to act in the use of the OCLC System and OCLC Services with good faith as to all other OCLC users, doing nothing to waste, diminish or cause harm to the shared beneficial interest of such other OCLC users. It is a duty of OCLC users to act cooperatively with each other and to avoid practices which have the effect either of shifting the burden of payment for OCLC products and services away from those receiving the same, or manipulating use of the OCLC System in ways which unreasonably and adversely affect its performance.

## **SECTION 9. TERM AND TERMINATION**

**9.1. Term.** Subject to the balance of this Section 9, this Agreement shall remain in effect indefinitely, until terminated by either party entirely in its own discretion and for any reason whatsoever, upon not less than ninety (90) days' prior written notice to the other.

**9.2. Breach.** When a party in material breach has not corrected same or diligently taken necessary corrective action within twenty (20) days after notice of such breach, which action will enable the party to cure the breach within a reasonable time, or if the party becomes insolvent or is the subject of a bankruptcy, then the other party shall be entitled to seek appropriate relief under this Agreement and under applicable law, which relief includes, without limitation, termination of this Agreement by written notice, without liability therefor.

## **SECTION 10. GENERAL**

**10.1. Applicable Law.** This Agreement shall be governed by the laws of the State of Ohio and the United States of America. All litigation of claims hereunder shall be brought solely in state or federal courts in Franklin County, Ohio, USA, unless otherwise provided for herein. The United Nations Convention on Contracts for the International Sale of Goods shall not apply.

**10.2. Entire Agreement.** This Agreement is the final, complete and exclusive statement of the agreement of the parties with respect to the subject matter hereof. No provision of this Agreement may be changed, modified or supplemented except by a writing signed by both parties, unless otherwise provided for herein.

**10.3. Export.** User assures OCLC that User and each Designated Library intends to use all OCLC Services, bibliographic and other data and documentation, including all updates and revisions, provided by OCLC at any time and under any agreement, only in the country of such User and Designated Libraries as set forth in this Agreement, and that neither User nor any Designated Library ships, exports or reexports them, directly or indirectly, to any other country. OCLC's obligations to deliver OCLC Services hereunder are contingent upon OCLC obtaining the necessary licenses to do so.

**10.4. Survival.** The rights and obligations under Sections 4.3, 5, 6 and 7 of this Agreement shall survive the termination or expiration thereof.

**10.5. Force Majeure.** Neither party shall be liable for any failure or delay in performance hereunder (other than of an obligation to pay money) due to or resulting from any cause beyond its reasonable control including, but not limited to acts of God, acts of the other party, strikes, shortage or materials, actions of government, fire, adverse weather conditions or operational failure, provided that the party so affected notifies the other promptly of the commencement and nature of the cause, the corrective steps to be taken and the estimated duration of the delay.

**10.6. Notices.** Except as provided in the following sentence, any notices required or desired to be given by either party pursuant to this Agreement, shall be in writing and shall be deemed sufficient if delivered by hand or sent by certified mail, return receipt requested, to the address of the other party as set forth in this Agreement. Notwithstanding anything in this Agreement to the contrary, price lists and any notice required by Section 2.4 or 4.2 of this Agreement may be provided to User and Designated Libraries electronically or by any other means reasonably calculated to result in actual receipt.

**10.7. Effect of Waiver.** Except as otherwise expressly provided in this Agreement, no failure on the part of either party to exercise, and no delay in exercising, any right, privilege, or power under this Agreement precludes any other further exercise thereof, or the exercise of any other right, privilege, or power. Waiver by either party of any breach of any provision of this Agreement shall not constitute nor be construed as a continuing waiver or as a waiver of any other breach of any other provision of this Agreement.

#### **SECTION 11. ADDITIONAL TERMS APPLICABLE TO USERS ACTING ON BEHALF OF CONSORTIA MEMBERS**

If User is a consortium acting on behalf of the member libraries of the consortium, the following terms apply in addition to the other terms and conditions of this Agreement:

**11.1** User agrees as agent for the member libraries of the consortium (the "Consortium Libraries") that each Consortium Library shall comply with the terms and conditions of this Agreement applicable to Designated Libraries. User warrants that it is authorized to bind Consortium Libraries to this Agreement and shall indemnify OCLC from all loss, expense and damage arising from a breach of such warranty. User shall provide each Consortium Library with a copy of this Agreement prior to OCLC's activation of relevant authorizations. User shall use its reasonable efforts to ensure that Consortium Libraries comply with this Agreement. Subject to OCLC acceptance, each designation of a Consortium Library shall result in a direct contract between OCLC and that Consortium Library.

**11.2** User is not a buyer of OCLC products and services for resale, and shall not charge Consortium Libraries for OCLC products and services, nor for User's services as agent or other services provided by User in connection with OCLC products and services made available hereunder.

**11.3** User is not authorized to make any representations or contract commitments on behalf of OCLC, nor to sign or negotiate any changes to any OCLC terms. Any modifications proposed by any Consortium Library to the applicable OCLC terms and conditions shall be submitted in writing to OCLC in advance for OCLC's written prior approval.

**11.4** OCLC's retention of User's assistance in making OCLC products and services available hereunder is on a non-exclusive basis, and nothing in this Agreement shall limit OCLC's right to distribute products and services independent of User, including to Consortium Libraries.